IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 24, 2008 Session

GEORGE H. BADGETT, ET AL. v. ADVENTIST HEALTH SYSTEMS SUNBELT, INC. d/b/a TENNESSEE CHRISTIAN MEDICAL CENTER

Appeal from the Circuit Court for Davidson County
No. 04C-2470 Thomas W. Brothers, Judge

No. M2007-02192-COA-R3-CV - Filed July 31, 2009

In this action concerning alleged malpractice by hospital staff, the trial court found plaintiff's expert affidavit failed to meet the locality test of Tenn. Code Ann. § 2-26-115 where the only similarities proven between the medical communities were population, existence of feeder hospitals and existence of medical school. Finding the trial court did not abuse its discretion, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J.,M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., and ANDY D. BENNETT, JJ., joined.

William L. Moore, Jr., Joe H. Thompson, Gallatin, Tennessee, for the appellants, George H. Badgett and Wife, Mabel Badgett.

Bryan Essary, Nashville, Tennessee, for the appellee, Adventist Health System/Sunbelt, Inc., d/b/a Tennessee Christian Medical Center.

OPINION

Mr. and Mrs. George Badgett sued Adventist Health System/Sunbelt, Inc., d/b/a Tennessee Christian Medical Center ("the Hospital"),[1] for medical malpractice to recover for injuries sustained by Mr. Badgett when he fell while at the Hospital. According to the Badgetts, the Hospital staff was negligent in the care of Mr. Badgett, and this negligence resulted in his fall.

According to the complaint, in August of 2002 Mr. Badgett was admitted to the Hospital with complaints that he was depressed, had problems sleeping, had a decreased appetite, wandered, often

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[1] The Complaint also named five doctors as defendants who allegedly treated Mr. Badgett. While the entire record is not a part of this appeal, it is not disputed that all of the defendant doctors have been dismissed.

became confused and disoriented, and experienced memory problems. While his age is not specified in the complaint, the record indicates he was 80 years old at the time of his hospitalization. In the "falls risk assessment" conducted by the Hospital, he was classified at "high risk" for falls. The Hospital assessment sheet noted that "fall precautions" should be taken with Mr. Badgett and that he required bathroom assistance.

The Hospital records reflect that on the evening of August 24, Mr. Badgett was confused. The next day, August 25, the Hospital personnel noted Mr. Badgett was very disoriented. On the afternoon of August 25, Mrs. Badgett visited her husband and noticed he was unsteady. She advised the nurse's station of her concern he might fall. Among the medications given Mr. Badgett during his stay at the Hospital were Aviten and Ambien which, according to the complaint, decreased alertness.

According to the complaint, appropriate "fall precautions" were not taken. Mr. Badgett fell the evening of August 25 while wandering in the day room, suffering significant injury including a fractured hip.

On July 6, 2007, the Hospital filed a motion for summary judgment with supporting documents including a Statement of Undisputed Facts ("Statement"), affidavit of Dr. Deborah Robin, and excerpts from the depositions of two registered nurses and Dr. Clifford Roberson. In opposition to the Hospital's motion, the Badgetts filed their responses to the Hospital's Statement and the affidavit of their medical expert, Dr. Rudyk.

The trial court granted the Hospital's motion for summary judgment finding as follows in its Amended Order of Dismissal:

> Based on the pleadings, the record, and the argument of counsel, the Court finds that the affidavit of Mary Rudyk, M.D., the Plaintiffs' only expert, fails to establish that she has sufficient familiarity with Nashville, Tennessee to offer competent testimony concerning the applicable standard of care in Nashville. The Court further finds that the affidavit fails to establish that the witness has sufficient familiarity with Nashville to be able to competently opine that the communities of Charlotte and Raleigh/Chapel-Hill, North Carolina, with which she claims to have familiarity, are sufficiently similar to Nashville to satisfy the threshold requirements under the "locality rule" within Tenn. Code Ann. § 29-26-115. Therefore, Dr. Rudyk's testimony by affidavit is not admissible and cannot be relied upon to respond to the Motion for Summary Judgment filed on behalf of Tennessee Christian Medical Center.
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> Considering the materials filed on behalf of Tennessee Christian Medical Center and the lack of admissible testimony submitted on behalf of the Plaintiffs, the Court finds that there are no genuine issues of material fact and that Tennessee Christian Medical Center is entitled to a judgment in its favor dismissing the

> Plaintiffs' claims, as a matter of law. Therefore, the Plaintiffs' claims are dismissed with prejudice, costs are taxed to the Plaintiffs and their surety, and execution may issue if necessary.

The Badgetts appeal the trial court's finding that Dr. Rudyk's testimony does not comply with the locality requirements of Tenn. Code Ann. § 29-26-115.

I. SUMMARY JUDGMENT

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co.*, *Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004).

The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin*, 271 S.W.3d at 83. To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin*, 271 S.W.3d at 84; *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d at 215).

Expert testimony is required to establish negligence and causation in medical malpractice cases, except where the act of alleged malpractice lies within the knowledge of ordinary laymen. *Kenyon v. Handal*, 122 S.W.3d 743, 758 (Tenn. Ct. App. 2003); *Mercer v. HCA Health Services of Tennessee*, 87 S.W.3d 500, 507 (Tenn. Ct. App. 2002). Tennessee Code Annotated § 29-26-115 sets out the requirements for establishing a malpractice claim, providing in pertinent part:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
>
> > (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred;
> > (2) That the defendant acted with less than or failed to act with ordinary and reasonable care in accordance with such standard; and

> (3) As a proximate result of the defendant's negligent act or omission, the plaintiff suffered injuries which would not otherwise have occurred.
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred. This rule shall apply to expert witnesses testifying for the defendant as rebuttal witnesses. The court may waive this subsection (b) when it determines that the appropriate witnesses otherwise would not be available.

As discussed above, in order to be successful on summary judgment, a defendant must negate an essential element of plaintiff's claim. Medical malpractice actions are no exception to this rule.

> In the malpractice actions wherein expert testimony is required to establish negligence and probable cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the actions on summary judgment, in the absence of proper responsive proof by affidavit or otherwise.

Bowman v. Henard, 547 S.W.2d 527, 531 (Tenn. 1977).

II. ADMISSIBILITY OF EXPERT PROOF

There is no dispute that the Hospital's staff's alleged negligence, if proved, constitutes medical malpractice which is governed by Tenn. Code Ann. § 29-26-115 and not simple negligence. The first issue before us is whether the Hospital carried its summary judgment burden, *i.e.*, in this case, whether it negated an essential element in the Badgetts' claim.

A) The Hospital's Burden

In support of its motion for summary judgment, the Hospital provided the affidavit of Dr. Deborah Robin, a physician who practices medicine in Nashville, to prove that the Hospital**'s** staff complied with the applicable standard of care. According to Dr. Robin's affidavit, she is familiar with the applicable standard of care. Dr. Robin has served as associate professor at Vanderbilt University School of Medicine since 2000, Medical Director of the Subacute Care Unit at Vanderbilt University Medical Center since 1995, and has been Medical Director at McKendree Village in Hermitage, Tennessee since 1997. After review of the pertinent materials, including depositions and Mr. Badgett's medical records, Dr. Robin gave the following opinions:

> The TCMC staff complied with the recognized standard of acceptable professional practice applicable to their evaluation, monitoring, care, treatment, and management of Mr. Badgett. More specifically, the TCMC staff complied with the standard of care by implementing suicide precautions, which included 15-minute observations of Mr. Badgett and were more stringent than the expected observations under the falls risk program. Additionally, the TCMC staff complied with the standard of care by providing Mr. Badgett with non-skid footwear and an arm bracelet.
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> The TCMC staff complied with the standard of care on August 25, 2002 by administering Ambien pursuant to the instructions of the prescribing physician, Clifford Roberson, M.D.
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> Any charting abnormalities that occurred in this case also did not cause or contribute to any injury which Mr. Badgett would not have otherwise suffered. Likewise, since Mr. Badgett was not confined to his room, the fact that he was assigned to a room on the opposite end of the hall from the nurses' station did not cause or contribute to any injury which Mr. Badgett would not have otherwise suffered.
>
> No action or inaction on the part of any employee of TCMC caused or contributed to any injury which Mr. Badgett would not have otherwise suffered.
>
> All of my opinions expressed above are to a reasonable degree of medical certainty.

It is not disputed that the Hospital's expert, Dr. Robin, meets the locality requirements of Tenn. Code Ann. § 29-26-115. At oral argument, the issue arose whether Dr. Robin met the relevancy requirement of Tenn. Code Ann. § 29-26-115(b), *i.e.* whether Dr. Robin is "licensed to practice . . . a profession or specialty which would make the person's expert testimony relevant to the issues in the case." The allegations are that the Hospital's staff, specifically the nurses, were negligent. Thus, the question is whether Dr. Robin's testimony is relevant to whether the nursing staff followed the applicable standard of care.

The burden of establishing that an expert meets the requirements of Tenn. Code Ann. § 29-26-115 is on the party offering the expert, whether it be a plaintiff or defendant. *Allen v. Methodist Healthcare Memphis Hospitals*, 237 S.W.3d 293 (Tenn. Ct. App. 2007) (citing *Carpenter v. Klepper*, 205 S.W.3d 474, 483 (Tenn. Ct. App. 2006).

We believe Dr. Robin's affidavit showed a familiarity with the applicable standard of care for staff in the care of the elderly in defendant's medical community. Dr. Robin's affidavit shows that she is the medical director of the Vanderbilt Hospital Subacute Care Unit and McKendree Village, a retirement community. She has completed a two year fellowship in geriatrics and is Board Certified in geriatrics. We conclude that Dr. Robin's affidavit established the statutory requirements for admission of her testimony.

Dr. Robin testified that the Hospital staff complied with the applicable standard of care in their evaluation, monitoring, care, treatment, and management of Mr. Badgett. Consequently, the Hospital presented evidence negating an essential element of the Badgetts' claim, and the burden shifted to them to present countervailing evidence to establish a dispute of material fact.

B) The Plaintiffs' Proof and The Locality Requirements Of Tenn. Code Ann. § 29-26-115

In response to the Hospital's motion for summary judgment, the Badgetts filed the deposition of Dr. Mary Kathryn Rudyk. According to her affidavit, Dr. Rudyk is a North Carolina physician who, since 1997, has served as Chief of the Division of Geriatric Medicine at New Hanover Regional Medical Hospital in Wilmington, North Carolina. With regard to Dr. Rudyk's familiarity with the Hospital's community, the affidavit provided as follows:

> I am familiar with the medical communities and the recognized standard of acceptable professional practice ("standard of care") in the Wilmington, New Hanover County, North Carolina medical community; in the Charlotte, Mecklenburg County, North Carolina medical community; and the Research Triangle community in North Carolina; each of which is similar to the Nashville, Middle Tennessee medical community.
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> In the Research Triangle community, I have been an Assistant Professor in Geriatrics at the University of North Carolina School of Medicine; a medical school similar in mission and ranking to Vanderbilt University Medical School in Nashville, Tennessee. I have lectured in both Raleigh and Chapel Hill on the subject of geriatric medicine and dementia and have had interaction with psychiatrists, physicians and geriatricians in those communities to discuss the care of patients similarly situated to Mr. Badgett.
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> In the Charlotte area, I have also lectured and spoken to physicians from that community about the care and treatment of patients similarly situated to Mr. Badgett.
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> In both the Charlotte area and the Research Triangle area, there are larger hospitals and smaller community hospitals that feed to the larger hospitals. The same is the case with the Nashville, Davidson County community.
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> Demographically, the Charlotte metropolitan region, the Nashville metropolitan region and the Research triangle metropolitan region are similar, with each having approximately 1.5 million residents. Both Charlotte and Nashville have approximately 550,000 residents.
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> In addition, I have reviewed the medical records of patients treated in hospitals in both Charlotte and Raleigh, have received referrals from physicians in those communities and helped train medical students from the University of North Carolina.

> In the course and scope of my practice, I have examined, diagnosed, treated, and medically managed numerous patients who were admitted for treatment like Mr. Badgett. In that regard, I have worked closely and consulted with competent medical professionals in the care and treatment of geriatric patients with symptoms and conditions like those exhibited by Mr. Badgett as reflected in the medical records I reviewed.
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> The standard of care for the evaluation, monitoring, care, treatment, and management by competent hospital staff of patients such as Mr. Badgett is the same in the Charlotte, Mecklenburg County, North Carolina medical community and the Raleigh, Wake County, North Carolina medical community as it is in the Nashville, Davidson County, Tennessee medical community. More specifically, that standard of care requires competent hospital staff to appropriately assess patients such as Mr. Badgett for fall risks, to establish precautions to be followed when treating patients who are at risk for falls, and to actually implement and follow those precautions when a patient is assessed to be at heightened risk for falls. Again, that particular standard of care is the same for competent hospital staff who practice in Nashville, Davidson County, Tennessee, as the competent hospital staff who practice in the Charlotte, Mecklenburg County, North Carolina medical community and the Raleigh, Wake County, North Carolina medical community.

The trial court found the testimony of Dr. Rudyk did not meet the "locality requirements," as they are often described, of Tenn. Code Ann. § 29-26-115.[2] Appellate courts employ the "abuse of discretion" standard when reviewing a trial court's decision regarding competency of experts in medical malpractice actions. *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002); *Eckler v. Allen*, 231 S.W.3d 379, 384 (Tenn. Ct. App. 2006); *Kenyon*, 122 S.W.3d at 759. Under this standard, if "reasonable minds" can disagree about the propriety of the decision, it will be upheld. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). A trial court is deemed to have acted outside its discretion if it applies an incorrect legal standard, or reaches a conclusion that both is against logic and reasoning and causes an injustice to the complaining party. *Id*. *See also Mercer v. Vanderbilt University*, 134 S.W.3d 121, 131 (Tenn. 2004). This standard prohibits the appellate court from substituting its judgment for the trial court. *Eldridge*, 42 S.W.3d at 85.

Under the locality requirements of Tenn. Code Ann. § 29-26-115, an expert must either (1) have knowledge of the standard of care in the defendant's community, or (2) have knowledge of the standard of care in a community that is shown to be similar to the defendant's community. *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 553 (Tenn. 2006); *Hunter v. Ura*, 163 S.W.3d at 707; *Stovall v. Clarke*, 113 S.W.3d 715, 723 (Tenn. 2003); *Robinson v. LeCorps*, 83 S.W.3d 718, 724 (Tenn. 2002). The first alternative requiring knowledge of the standard of care in the defendant's community is known as the "strict locality rule," which has been historically followed in Tennessee.

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[2] The Hospital does not argue that Dr. Rudyk fails to meet the proximity, relevant specialty, or duration of experience requirements of Tenn. Code Ann. § 29-26-115(b).

Totty v. Thompson, 121 S.W.3d 676, 679 (Tenn. Ct. App. 2003). The second alternative in Tenn. Code Ann. § 29-26-115, knowledge of the standard in a community proven to be similar to defendant's community, is a legislative creation and is known as the "similar locality rule." *Id*.

As the court in *Totty* aptly noted "[f]ew areas of American Jurisprudence have been more challenging through the years than the development of the standard of care applicable in medical malpractice cases." *Totty*, 121 S.W.3d at 679. There have been several calls by the judiciary requesting that the legislature revisit this locality formulation. *See Eckler*, 231 S.W.3d at 287 (citing *Robinson*, 83 S.W.3d at 723-24).

As to the first method of satisfying the locality rule, the "strict locality rule," the trial court found Dr. Rudyk's affidavit does not establish that she is familiar with Nashville's standard of care. There is no dispute that the trial court correctly ruled that Dr. Rudyk does not meet the "strict locality rule."

The trial court also found Dr. Rudyk's affidavit failed "to establish that the witness has sufficient familiarity with Nashville to be able to competently opine that the communities . . . with which she claims to have familiarity, are sufficiently similar to Nashville to satisfy that the threshold requirements of the 'locality rule.'" The Badgetts argue the trial court erred when it found that Dr. Rudyk's proof also does not meet the "similar locality rule."

The similar locality rule may be met if it is established that the medical community of the expert is shown to be sufficiently similar to the defendants' medical community. Tenn. Code Ann. § 29-26-115(a)(1). Our Supreme Court has stated that proof was required under the similar locality rule "why the [defendants'] . . . medical community was similar to, and thus had the same standard of care" as the expert's community. *Williams v. Baptist Memorial Hospital*, 193 S.W.3d 545, 553-54 (Tenn. 2006) (quoting *Robinson v. LeCorps*, 83 S.W.3d 718, 725 (Tenn. 2002)).

Under this similar locality rule, the physician admittedly has no personal knowledge about the defendant's local standard of care but may, nevertheless, give an opinion if the expert is knowledgeable about the standard of care in a similar medical community and if it is proved that the medical communities are, indeed, similar. Two premises must be established to satisfy the "similar locality rule." If either premise is not proved, the expert has not satisfied the "similar locality rule" and may not testify. To meet the similar locality rule:

> 1) The expert must establish that the expert is in fact familiar with a standard of care in a specific medical community; and
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> 2) It must be proven by that expert or through other proof that the medical community where the expert claims familiarity with the standard of care is similar to the defendant's medical community.

The question is whether the trial court abused its discretion when it decided that Dr. Rudyk failed to show that the medical community in Nashville is similar to the communities in North Carolina where Dr. Rudyk claims to know the standard of care. Her testimony was the only proof on similarity.

There have been several cases in Tennessee on this issue that establish some parameters. We know that "a bare assertion of familiarity is insufficient" under Tenn. Code Ann. § 29-26-115(a)(1). *Williams*, 193 S.W.3d at 554; *Robinson*, 83 S.W.3d at 724-25; *Kenyon*, 112 S.W.3d at 762. There are cases which indicate that in order to prove two medical communities are similar, a threshold requirement is a familiarity with statistical information about the two communities - *i.e.*, population, number of hospitals, existence of medical schools and teaching hospitals, etc. General knowledge of a community's medical resources is considered "requisite threshold evidence of the communities' similarity." *Mabon*, 968 S.W.2d at 831. This is true because "a complete lack of knowledge concerning a community's medical resources would be contrary to knowledge of the required standard of care." *Mabon*, 968 S.W.2d at 831; *Sandlin v. University Medical Center*, M2001-00679-COA-R3-CV, 2002 WL 1677716, at *4 (Tenn. Ct. App. Jul. 25, 2002) (perm. app. denied Dec. 2, 2002).[3] In order to meet this threshold requirement, however, it is not required that an expert be familiar with "all of the medical statistics" of a community. *Kenyon*, 122 S.W.3d at 761-62; *Mabon*, 968 S.W.2d at 831 (citing *Ledford v. Moskowitz*, 742 S.W.2d 645, 648 (Tenn. Ct. App. 1987)); *Sandlin*, 2002 WL 1677716, at *4.

Consequently, while a comparison of the medical resources is a threshold requirement to determine whether two medical communities are similar, the question is whether knowledge of statistical information alone is enough and, if so, how much statistical information is necessary to show sufficient similarity between the communities to meet the statutory requirement.

In *Roberts v. Bicknell*, 73 S.W.3d 106 (Tenn. Ct. App. 2001), the court considered whether the trial court abused its discretion in finding that plaintiff's medical expert failed to meet the locality rule of Tenn. Code Ann. § 29-26-115(a)(1). The plaintiff testified that he had never been to defendant's community, did not know where it was located, did not know the number of hospitals, did not know whether there was a medical school or teaching hospital or the medical specialities offered in the community. *Id*. at 113-14. The Court of Appeals found the trial court did not abuse its discretion and made the following finding:

> The law on expert witnesses, as it exists in Tennessee, requires the expert to have *some* knowledge of the practice of medicine in the community at issue or a similar community. We believe that it is reasonable to base such knowledge, among other things, upon information such as the size of the community, the existence or non-

[3] Experts have been disqualified due to a lack of knowledge about the defendant's medical community's resources. *Mabon*, 968 S.W.3d at 831 (expert did not know population, number of hospitals, whether there were medical schools, number of doctors, types of medical specialities in defendants' medical community); *Ayers v. Rutherford Hospital*, 689 S.W.2d 155, 163 (Tenn. Ct. App. 1984) (expert did not know size of defendant's community, size of hospital, and had never been there).

> existence of teaching hospitals in the community and the location of the community. Without such information, it is difficult to compare communities for the purpose of satisfying the locality rule.

Roberts, 73 S.W.3d at 114 (emphasis in original). *See Taylor v. Jackson - Madison County General Hospital Dist.*, 231 S.W.3d 361, 366 (Tenn. Ct. App. 2006); *Carpenter v. Klepper*, 205 S.W.3d at 478; *Sandlin*, 2002 WL 1677716, at *4.

It is important to note that the Court in *Roberts* did not expressly find that a knowledge of similarity of some medical resources alone establishes sufficient similarity between medical communities so that it can be deduced that their standards of care are similar. Clearly, while the Court found it would be difficult to compare the communities without this statistical information, the court in *Roberts* did not hold that that alone was sufficient.

In *Travis v. Ferraraccio*, M2003-00916-COA-R3-CV, 2005 WL 2277589 (Tenn. Ct. App. Sept. 19, 2005) (no Tenn. R. App. P. 11 application filed), this court noted that statistical information alone about the resources in two medical communities is sufficient to prove the medical communities are sufficiently similar so one could extrapolate that the standards of care are similar:

> This court has stated on several occasions that a plaintiff's expert can establish that a community with which he or she is familiar is similar to that of the one in which the defendant practices based on a comparison of information such as the size, location, and presence of teaching hospitals in the two communities. [citing *Roberts* and *Sandlin*.]

2005 WL 2277589, at *11.

Clearly, the trend as seen in *Roberts*, *Taylor*, *Carpenter*, *Sandlin* and *Travis* is to interpret our "similar locality rule" to allow proof about medical resources and demographics to prove that two medical communities are similar. Consequently, relying on such proof *per se* is not an abuse of discretion. The question in the case before us, however, is whether the trial court abused its discretion in finding that Dr. Rudyk provided insufficient medical resource and demographic evidence to prove the medical communities are similar.

In this case, Dr. Rudyk claimed familiarity with two medical communities; Charlotte, and the "Research Triangle" communities in North Carolina.[4] Dr. Rudyk asserts that each of these communities is similar to Nashville's medical community. To support that assertion, Dr. Rudyk's affidavit states that the "Research Triangle" has a medical school like Nashville, that Charlotte and the "Research Triangle" have smaller hospitals that feed to larger hospitals as in Nashville, and Charlotte, the "Research Triangle," and Nashville have similar populations.

[4] Dr. Rudyk also claimed familiarity with Wilmington, North Carolina, where she actually practiced, but provided no proof in her affidavit that the Wilmington medical community is similar to Nashville's medical community.

In effect, the only proven similarities between Charlotte and Nashville are population and the existence of smaller hospitals that feed larger ones. The same is true for the "Research Triangle" except, in addition, it has a medical school like Nashville.

The trial court found Dr. Rudyk did not establish that she has sufficient familiarity with Nashville to opine whether Charlotte and Raleigh/Chapel Hill are similar to it. Based on the slight evidence presented regarding the similarities in the medical communities, we cannot conclude the trial court abused its discretion.[5] While this court may have reached a different conclusion in the first instance based on the holdings discussed above, we are bound by the abuse of discretion standard. In view of the absence of more definitive standards for applying the statutory test, we cannot hold the trial court in error.

Consequently, the trial court is affirmed. Costs on appeal are taxed to Mr. and Mrs. George Badgett for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.

[5] As an alternate ground to sustain the judgment, the Hospital also claims on appeal that Dr. Rudyk failed to establish her familiarity with the standard of care in the Charlotte and Research Triangle communities. While not ruled upon by the trial court, Dr. Rudyk's affidavit does offer some facts to establish why she is familiar with the standard of care in Charlotte and the Research Triangle. Since we affirm the trial court on the ground provided by the trial court, we decline to address this issue.